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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91170826
Party	Defendant ESPN, Inc. ESPN, Inc. ESPN Plaza Bristol, CT 06010
Correspondence Address	Alan Blum Quinn Emanuel Urquhart Oliver & Hedges, 335 Madison Avenue, 17th Floor New York, NY 10017
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Date	08/21/2006
Attachments	z.BIG AIR.pdf (9 pages)(116879 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of U.S. Trademark Application Serial No. 78/691,320
Mark: BIG AIR

CHARLES WORTHINGTON HAIR & BEAUTY COMPANY LIMITED, Opposer, v. ESPN INC., Applicant.	Opposition No. 91/170,826

MOTION TO SET ASIDE DEFAULT

Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure,[1] Applicant ESPN, Inc. ("ESPN") moves the Trademark Trial and Appeal Board ("TTAB") to set aside the Notice of Default entered against Applicant on July 20, 2006 and re-open this proceeding. An answer to the Notice of Opposition was prepared by counsel, but due to internal miscommunications was never filed. Until the Notice of Default was received on or about August 9, 2006, counsel believed that the answer had, in fact, been filed in this matter. Because Applicant can demonstrate that good cause exists, the TTAB should set aside the Notice of Default and allow Applicant to file a late answer, attached hereto as Exhibit A.

[1] Rule 55(c) of the Federal Rules of Civil Procedure governs when the TTAB determines whether or not to set aside a Notice of Default. *See* 37 C.F.R. § 2.116(a); TBMP § 312.01.

Under Rule 55(c), an entry of default can be set aside for "good cause shown." Fed. R. Civ. P. 55(c). Good cause is demonstrated by a showing that: 1) the applicant did not act willfully in failing to answer; 2) the opposer will not suffer any undue prejudice; and 3) the applicant has a meritorious defense to the opposer's claims. *See DeLorme Publ'g Co. v. Eartha's*, 60 U.S.P.Q.2d 1222, 1223-24 (TTAB 2000); *Paolo's Assoc. L.P. v. Paolo Bodo*, 21 U.S.P.Q.2d 1899, 1902 (TTAB 1990). The TTAB has discretion in setting aside a Notice of Default. TBMP § 312.01. In this case, all factors weigh in favor of setting aside the Notice of Default.

ESPN's Actions Were Not Willful

ESPN did not act willfully or in bad faith to delay these proceedings. As discussed above, the delay was entirely the product of an administrative error on the part of Applicant's counsel. The Board has previously found that such error did not rise to the level of "bad faith" and did not justify the imposition of a default judgment. *See H.J. Heinz Co. v. The Taco Maker, Inc.*, 2001 WL 300518 (TTAB 2001) (accepting applicant's late-filed answer where "applicant's failure to timely file its answer was clearly due to a docketing mix-up and not the result of any willful conduct or gross neglect"); *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 U.S.P.Q.2d 1556, 1557 (TTAB 1991) (setting aside a notice of default where failure to answer was due to inadvertent error on the part of applicant's counsel). Similarly, an attorney's clerical error should not be construed as bad faith on the part of ESPN.

Opposer Will Not Suffer Any Prejudice

Further, there is no indication that Opposer will suffer any prejudice whatsoever from setting aside the Notice of Default. ESPN's answer to the Notice of Opposition was due on June 19, 2006; allowing ESPN to file an answer now and continue with the opposition proceeding will

result in a delay of only a few months. Such a short delay does not constitute prejudice. *See Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 U.S.P.Q.2d 1154, 1156 (TTAB 1991) (stating that "delay alone is not a sufficient basis for establishing prejudice"). It is also highly unlikely that the Opposer has taken any affirmative steps in reliance of the two month delay such that proceeding with this matter would cause it any significant harm.

ESPN Has Meritorious Defenses

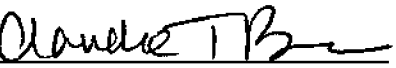
Lastly, ESPN has meritorious defenses to Opposer's claims. Opposer has objected to the registration of ESPN's BIG AIR trademark based on an alleged likelihood of confusion between the products offered by ESPN and those offered by Opposer under the designation CHARLES WORTHINGTON LONDON BIG HAIR. ESPN contends that there is no such likelihood of confusion and that the marks can coexist on the register without any problems. (Answer (Exhibit A hereto).)

ESPN did not intend to allow a default judgment to enter in this case, has intentions vigorously to defend its trademark application on the merits, and has shown that good cause exists to set aside the Notice of Default. Accordingly, the Notice of Default should be set aside and ESPN should be allowed to file its answer in this proceeding.

Dated: New York, New York
August 21, 2006

Respectfully submitted,

Quinn Emanuel Urquhart Oliver & Hedges, LLP

By: 

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ATTORNEYS FOR APPLICANT ESPN INC.

CHARLES WORTHINGTON HAIR & BEAUTY COMPANY LIMITED,
Opposer

-against-

ESPN INC.,
Applicant

Opposition No. 91/170,826

Applicant's Motion to Set Aside Default
Ex. 1

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of U.S. Trademark Application Serial No. 78/691,320
Mark: BIG AIR

CHARLES WORTHINGTON HAIR & BEAUTY COMPANY LIMITED, Opposer, v. ESPN INC., Applicant.	Opposition No. 91/170,826

ANSWER TO NOTICE OF OPPOSITION

Applicant ESPN INC., through its undersigned attorneys, as its answer to the Notice of Opposition of CHARLES WORTHINGTON HAIR & BEAUTY COMPANY LIMITED, in the above-mentioned matter, alleges as follows:

1. Applicant lacks information sufficient to admit or deny the allegations in Paragraph 1.

2. Applicant lacks information sufficient to admit or deny the allegations in Paragraph 2, but avers that the web site of the United States Patent and Trademark Office names Opposer as the owner of Registration No. 2,563,996, which issued April 23, 2002, for the designation CHARLES WORTHINGTON LONDON BIG HAIR & Design for "hair care products, namely shampoos, conditioners and sprays for styling, shaping and grooming."

3. Applicant lacks information sufficient to admit or deny the allegations in

Paragraph 3, but avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

4. Applicant lacks information sufficient to admit or deny the allegations in Paragraph 4, but avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

5. Applicant admits the allegations in Paragraph 5.

6. Applicant admits the allegations in Paragraph 6.

7. Applicant admits the allegations in Paragraph 7.

8. Applicant admits that hair pomade, shampoos, and hair rinses conditioners are related to the goods offered by Opposer under its designation CHARLES WORTHINGTON LONDON BIG HAIR & Design; Applicant denies the remainder of the allegations in Paragraph 8 and avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

9. Applicant denies the allegations in Paragraph 9 and avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

10. Applicant denies the allegations in Paragraph 10 and avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

11. Applicant denies the allegations in Paragraph 11 and avers that the designation asserted by Opposer in this Opposition is CHARLES WORTHINGTON LONDON BIG HAIR & Design.

12. Applicant denies the allegations in Paragraph 12.

13. Applicant avers that the WHEREFORE paragraph of the Notice of Opposition does not contain any allegations that require a response. To the extent that the WHEREFORE paragraph is deemed to include allegations, Applicant denies them.

FIRST AFFIRMATIVE DEFENSE

Opposer fails to allege facts sufficient to state a claim upon which relief can be granted in the Opposition.

WHEREFORE, Applicant ESPN Inc. respectfully requests that this Board issue an order dismissing the Notice of Opposition in its entirety.

Dated: New York, New York
August 21, 2006

Respectfully submitted,

Quinn Emanuel Urquhart Oliver & Hedges, LLP

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ATTORNEYS FOR APPLICANT ESPN INC.

CERTIFICATE OF SERVICE

I certify that on the 21st day of August, 2006 a true copy of APPLICANT'S MOTION TO SET ASIDE DEFAULT was served on Opposer, by sending the same by U.S. mail postage prepaid to Mark B. Harrison, Venable LLP, P.O. Box 34385, Washington, D.C. 20043-9998.

Claudia T. Bogdanos